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Ellen Hays v. Fidelity Industrial Credit Company and North American Life and Casualty Company : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT FOR THE

STATE OF UTAH

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ELLEN HAYS,

Plaintiff and Appellant,

vs.

FIDELITY INDUSTRIAL CREDIT COMPANY OF OGDEN and NORTH AMERICAN LIFE AND CASUALTY COMPANY, an Insurance Corporation,

Defendants and Respondents.

Case No. 14195

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BRIEF OF RESPONDENT NORTH AMERICAN LIFE AND CASUALTY COMPANY

Appeal from the Judgment of the Second Judicial District Court for Weber County, Honorable John F. Wahlquist, Judge

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BRIEF OF RESPONDENT
NORTH AMERICAN LIFE AND CASUALTY COMPANY

STATEMENT OF THE NATURE OF CASE

This action was brought by ELLEN HAYS, Plaintiff-Appellant to recover as Beneficiary on a policy of life insurance on the life of her husband even though immediately prior to his death the policy had been surrendered by him as owner-insured for the cash values therein.

DISPOSITION IN LOWER COURT

On Motion of Respondent, NORTH AMERICAN LIFE AND CASUALTY COMPANY for Summary Judgment based on admitted and uncontested facts, the Court as a matter of law dismissed the Plaintiff's Complaint (R. 154-5).

RELIEF SOUGHT ON APPEAL

Respondent, NORTH AMERICAN LIFE AND CASUALTY COMPANY seeks the affirmance of the Judgment granted by the District Court.

STATEMENT OF FACTS

Respondent, NORTH AMERICAN LIFE AND CASUALTY COMPANY considers the statement of facts contained in Appellant's Brief to be inaccurate, incomplete and inadequate and therefore elects to set forth the facts necessary to consideration of this case on appeal by this Court.

MARVIN E. HAYS, was the husband of ELLEN HAYS, Plaintiff-Appellant herein (R. 4). By Application No. 265971 bearing date of April 9, 1965, MARVIN E. HAYS, at Ogden, Utah, applied to NORTH AMERICAN LIFE AND CASUALTY COMPANY through its agent, GAIL L. SALTUS, for the issuance of a policy of life insurance (R. 105 and 106). On the 8th day of July, 1965, NORTH AMERICAN LIFE AND CASUALTY COMPANY issued Policy No. L-939534 to MARVIN E. HAYS, who was then of the age of 45 years (R. 105). The initial sum of insurance or face value of the policy as of the date of issuance was $5,000.00 (R. 105). Certain other benefits were also applied for in connection with the policy (R. 105 and 106). Premiums were paid and the policy was continued in full force and effect, to just prior to March 21, 1972, when an inquiry was initiated by MARVIN E. HAYS through RON JENSEN of FIDELITY INDUSTRIAL CREDIT COMPANY OF OGDEN to NORTH AMERICAN LIFE AND CASUALTY COMPANY as to adjusted cash value in the policy of life insurance hereinabove referred to (R. 99, 102 and 110). The company replied to HAYS in care of RON JENSEN, advising that the cash value was $283.13. The letter advising of the cash value stated,

> "We are enclosing Surrender Forms but urge that you consider the suggestions on the reverse side of the form before proceeding with the surrender of your insurance" (R. 102).

On the reverse side of the Application for Surrender are set forth seven suggestions urging the insured not to relinquish his insurance but to use other methods to raise funds and protect his insurance (R. 103). The policy of insurance carried this expres provision,

> "The insured shall be the owner of this policy, unless otherwise provided. With the exception of the benefit payable at the death of the insured to the Beneficiary, the owner, subject to the rights of any assignee, shall have all rights, privileges and benefits contained in this policy." (R. 23, Interrogatory No. 2, policy attached).

There was no provision of the policy which limited MR. HAYS' rights as owner-insured. One of the "non-forfeiture benefits" of the policy was the right of the owner to surrender the policy at any time for its cash surrender value (R. 23, policy attached). Despite the admonition contained in the letter from the company under date of March 21, 1972 (R. 102), MARVIN E. HAYS elected to file with the company, a surrender of the policy for its cash value (R. 104). This surrender was duly signed at Ogden, Utah, according to its terms, on March 24, 1972, and was witnessed by one RON JENSEN (R. 104). Plaintiff-Appellant admits that this action was taken by the insured as owner of the policy on March 24, 1972 at approximately twelve o'clock noon (R. 99). Plaintiff further admits that thereafter and prior to his death, MARVIN E. HAYS did nothing to rescind the action which he had taken (R. 89, No. 5). The Application for the cash surrender value of the policy was put out of the control of the applicant and forwarded by mail to the insurance company by regular mail, March 24, 1972 (R. 75, No. 19). The insurance company received the Application for cash surrender value at its headquarters in Minneapolis, Minnesota, on March 27, 1972 (R. 51, No's. 16F and G and 17). The Application was processed immediately and a check issued March 28, 1972 (R. 16G, R. 112). On March 27, 1972, at approximately 10:30 A.M., the insured MARVIN E. HAYS, died at St. Benedicts Hospital in Ogden, Weber County, Utah (R. 100 The check in the amount of $283.13 for the cash value of the policy was taken by the Plaintiff-Appellant herein and cashed (R. 89, R. 100). Though immaterial to the decision of the case, Plaintiff claims to have given notice to FIDELITY INDUSTRIAL CREDIT COMPANY OF OGDEN, at about noon on March 27, 1972, of the death of MARVIN E. HAYS, the insured (R. 99, 100). RON JENSEN of FIDELITY INDUSTRIAL CREDIT COMPANY OF OGDEN claims to have notified the Respondent insurance company at its home office by telephone on the same date, March 27, 1972, at an unknown hour, of

the death of MARVIN E. HAYS (R. 75). The insurance company has been unable to locate any record of receipt of any such telephone call (R. 53, No. 26). Some three months after the Plaintiff had received and cashed the check of NORTH AMERICAN LIFE AND CASUALTY COMPANY for the cash surrender value of the policy issued to the insured, the Plaintiff retained the services of MR. VLAHOS to attempt to recover the face value of the insurance policy (R. 100, 101). Action was initially commenced by the Plaintiff as Administratrix of the Estate of MARVIN E. HAYS, by the filing of a Complaint in that capacity in the District Court of Weber County, State of Utah, dated the 17th day of December, 1972, and filed December 20, 1972 (R. 1-3). Ultimately the Complaint was amended to set forth the claim on behalf of the Plaintiff-Appellant as the Beneficiary of the policy of insurance (R. 60-62). It is in this capacity that Plaintiff proceeded with the lawsuit (R. 60-63). The foregoing are essential facts. Additional facts necessary to the consideration of the Plaintiff's claim of lack of opportunity for discovery will be set forth as needed in the argument.

ARGUMENT

POINT I

PLAINTIFF-APPELLANT'S CONTENTION THAT ADEQUATE DISCOVERY WAS DENIED WAS NOT PRESENTED TO THE LOWER COURT, IS WITHOUT MERIT AND CANNOT SERVE AS A BASIS FOR REVERSAL OF THE COURT BELOW

Even a cursory examination of the record discloses the lack of validity to the claim asserted at this date by Plaintiff-Appellant that she was denied her right of adequate discovery. The case was pending from December 20, 1972 (R. 1) until its ultimate decision by the HONORABLE JOHN F. WALQUIST by memorandum decision made and entered the 30th day of June, 1975, a space of two and one-half years in which Plaintiff-Appellant made no effort at the discovery which Appellant now claims was denied to it. Despite the fact that the relationship of NORTH AMERICAN LIFE AND CASUALTY and FIDELITY INDUSTRIAL CREDIT COMPANY OF OGDEN is totally immate

rial to the decision of the Court in this matter, as will be more fully shown in the discussion of the merits of this cause under POINT II of this Brief, neither NORTH AMERICAN LIFE AND CASUALTY COMPANY nor FIDELITY INDUSTRIAL CREDIT COMPANY OF OGDEN have failed to respond appropriately as determined by the lower Court to the discovery directed to either NORTH AMERICAN LIFE AND CASUALTY COMPANY or to FIDELITY INDUSTRIAL CREDIT COMPANY OF OGDEN (R. 22-34, 43, 44, 46-55, 74,75). At pages 5 and 6 of the Appellant's Brief, Appellant implies that the NORTH AMERICAN LIFE AND CASUALTY COMPANY had refused to furnish the details of the insurance policy issued by that company upon the life of MARVIN E. HAYS. The Appellant states that

> "the Respondent attached an insurance form in blank without setting forth therein any of the information contained in the original policy and without any of the items of specificity desired by the Appellant, such as the amount of the policy, provisions for additional benefits, the named Beneficiary, the name of the agent or agents subscribing to the policy of insurance".

Appellant neglects to advise the Court that in Open Court on the occasion of the appearance before the HONORABLE RONALD O. HYDE, JUDGE, on the 3rd day of July, 1973 on the Defendant NORTH AMERICAN LIFE AND CASUALTY COMPANY'S objections to the Interrogatories of the Plaintiff, Defendant-Respondent's attorney presented to the attorney for the Plaintiff the details requested in the form of a reproduced copy of the actual application and of the face of the actual policy. That the details of the policy requested by Plaintiff were furnished to the Plaintiff is admitted in the Motion and Notice to Amend Complaint filed by MR. VLAHOS on behalf of his client under date of December 11, 1973, wherein he states:-

> "Subsequent to the filing of the Complaint herein and following discovery of the terms of the insurance policy, the Plaintiff believes that the real party in interest is Ellen Hays individually instead of as Administratrix of the Estate of Marvin E. Hays, and therefore, desires to file an Amended Complaint to show the proper party in interest herein.
>
> This Motion is based upon the pleadings, papers, records, and files in this action". (R. 63) (Emphasis ours)

These details were again supplied in the Respondent's narrative statement of facts dated January 17, 1975, and filed by the Court January 23, 1975 (R. 105-107). In view of the fact that the matter of the Plaintiff's Interrogatories and the objections thereto by the Defendant-Respondent, NORTH AMERICAN LIFE AND CASUALTY COMPANY, were ruled upon by the Court, it would seem that if Plaintiff claimed any error by the Court in the ruling so made, an appeal should be prosecuted from the decision of the Court made and entered by the HONORABLE RONALD O. HYDE on July 12, 1973 (R. 43,44). No such appeal has been taken nor does Plaintiff-Appellant designate any part of this appellate procedure as having been taken from that ruling. It should also be noted that amended answers to the Interrogatories of Plaintiff were filed setting forth all of the information ordered by the Court, under oath, served on Plaintiff by mail October 16, 1973 and filed October 17, 1973 (R. 46-54). No exception was noted, no objections were made by the Plaintiff-Appellant personally to counsel or formally with the Court to the answers of Defendant. No further Interrogatories or demands were made or directed to Defendant, NORTH AMERICAN LIFE AND CASUALTY COMPANY, nor were any deficiencies in the response pointed out in either further pleadings by Plaintiff or otherwise until the filing of the Appellant's Brief in this action. Under date of January 10, 1975, attorney for the Plaintiff-Appellant set forth in a communication directed to the HONORABLE JOHN F. WALQUIST to ALLEN H. TIBBALS and to CARL T. SMITH as counsel for the respective Respondents, a statement that:

> "however depositions are going to be set in connection with the one employee at Fidelity Industrial Credit of Ogden and also Mr. Gail T. Saltus of Salt Lake City, Utah". (R. 99-101 at 101)

Initially by telephone to PETE VLAHOS, confirmed by letter dated January 8, 1975 to both VLAHOS and CARL T. SMITH and ultimately included in the narrative statement of facts supplied by NORTH AMERICAN LIFE AND CASUALTY COMPANY in compliance with

the Order of the Court and mailed as shown by the mailing certificate attached thereto to the attorney for the Plaintiff-Appellant, the full name and address of GAIL L. SALTUS was set forth where he could be reached both as to his residence and as to his business at that date (R. 105-108 at 106). After the filing of the narrative statements above referred to, Respondent waited for an additional four months before petitioning the Court for a Summary Judgment in the matter. No Depositions were ever scheduled by Plaintiff. The Motion for Summary Judgment was duly served upon the attorney for the Plaintiff by mail on the 9th day of May, 1975, as shown by the amended Certificate of Mailing (R. 113). No objection to th Motion, no Petition for any relief seeking the opportunity for further discovery was ever filed by Plaintiff nor were any Affidavits or other statements made controverting any of the facts or indicating the existence of a factual issue to be decided by the Court beyond the scope of the admitted facts before it. At the hearing on the Motion for Summary Judgment, the Court after the oral argument and the presentation of a written Brief at the hearing by Defendant, NORTH AMERICAN LIFE AND CASUALTY COMPANY specifically allowed time for the filing of a response in writing by Plaintiff, and took the Motion under advisement (R. 117). No Brief was submitted by Plaintiff (R. 148). It should be noted that the Court waited until the 30th day of June, 1975 before proceeding further by the entry of its memorandum decision (R. 148, 149). After the issuance of the memorandum decision (R. 148, 149), Respondent prepared and served Findings of Fact and Conclusions of Law and a Decree (R. 150, 155). No Motion for new trial or to set aside the Findings, Conclusions of Law and Judgment or other appeal for relief to the lower Court was ever made by the Appellant in this matter (R. 148).

The multitude of authority cited by Appellant in support of the right of discovery are needless. No one has denied to the Appellant the right of discovery,

Appellant simply did not exercise the right and it does not become the duty of the Respondent or of the Court to conduct the discovery for the Plaintiff-Appellant. We do not quarrel with the authorities cited by Appellant, they are simply inapplicable to the factual situation in this case as disclosed by the record. This matter may not be raised for the first time on appeal. Appellant did not afford the lower Court any opportunity to rule upon or consider any claim by Appellant that any right of discovery was being denied by that Court. In the case of CLAASEN vs. FARMER'S GRAIN COOPERATIVE., 208 Kansas 129,490 P.2d 376, the Court under similar circumstances said:-

"Syllabus by the Court

1. A party against whom a motion for summary judgment is sustained cannot object on appeal to the action of the trial court in hearing and acting on the motion when the record discloses that he introduced no evidence at the hearing on the motion for summary judgment, did not object thereto, and did not request time to make further discovery."

****

"(1) Plaintiff first claims error in that the trial court sustained the defendant's motion for summary judgment without a pretrial conference or without permitting plaintiff to produce evidence refuting the testimony of defendant's witnesses. The record does not disclose that plaintiff objected to the hearing on the motion for summary judgment or asked for time to make further discovery. The plaintiff cannot now object to the ruling of the trial court. (Bicknell v. Jones, 203 Kan. 196, 453 P.2d 127.)"

We respectfully submit that Appellant's contention is without merit.

POINT II

PLAINTIFF-APPELLANT HAS NO ENFORCEABLE CLAIM TO DEATH BENEFITS AGAINST THE DEFENDANT, NORTH AMERICAN LIFE AND CASUALTY COMPANY UNDER THE POLICY SURRENDERED BY THE OWNER-INSURED PRIOR TO HIS DEATH FOR THE CASH SURRENDER VALUE AS A NON-FORFEITABLE BENEFIT UNDER THE POLICY

Plaintiff-Appellant's claim arouses the sympathy of anyone to whom the facts may be presented. By a cruel quirk of fate the husband of the Plaintiff,

MARVIN E. HAYS, was called by death within three days after having exercised an election to surrender the insurance policy on his life, of which he was the owner, to NORTH AMERICAN LIFE AND CASUALTY COMPANY for its cash surrender value, thereby depriving the Plaintiff as Beneficiary of death benefits otherwise payable under the policy. The situation is sad but there is no legal basis upon which the Defendant-Respondent, NORTH AMERICAN LIFE AND CASUALTY COMPANY can pay out the dea benefits under the policy to this Plaintiff. For reasons best known to himself, MARVIN E. HAYS, husband of the Plaintiff-Appellant, ELLEN HAYS, decided to give up the policy which he had carried with NORTH AMERICAN LIFE AND CASUALTY COMPANY since 1965 and accept the cash benefit under the policy as was his non-forfeitable privilege. He initiated the steps in connection with this matter through FIDELITY INDUSTRIAL CREDIT COMPANY OF OGDEN. He went to that company and requested that th ascertain what the cash benefits were on this policy (R. 26, 15D). NORTH AMERICAN LIFE AND CASUALTY COMPANY responded to this request for information by forwarding to MR. HAYS, in care of RON JENSEN of FIDELITY INDUSTRIAL CREDIT COMPANY OF OGDEN, a letter dated March 21, 1972, setting forth the cash surrender value of the polic and specifically urging that MR. HAYS consider the suggestions on the reverse side of the form which was enclosed before proceeding with the surrender of his insurance (R. 102, 103). MR. HAYS, nevertheless concluded that he desired to have the cash values in the policy and did execute in the presence of RON JENSEN, a form, "Surrender of Policy for Cash Value" (R. 104) on the 24th day of March, 1972 (R. 104 R. 71, 75, Interrogatories 17, 18 and 19 and responses thereto). Having executed the Application for the surrender of the policy for cash value, MR. HAYS, then turned the same over to RON JENSEN of FIDELITY INDUSTRIAL CREDIT COMPANY OF OGDEN to forward the same to NORTH AMERICAN LIFE AND CASUALTY COMPANY. MR. JENSEN prompt carried out the wishes of MR. HAYS and did forward the Application to NORTH AMERICA LIFE AND CASUALTY COMPANY on March 24, 1972, by regular mail (R. 75, Interrogatory

19 and answer thereto). NORTH AMERICAN LIFE AND CASUALTY COMPANY actually received the Application for the cash surrender value of the policy on March 27, 1972 (R. 51, Interrogatory 16, answer sub-paragraph f and No. 17). The form was promptly processed by the company and a check in the amount of $283.13, payable to the insured, was issued (R. 51, Interrogatory 16, sub-paragraph g, R. 112 and R. 100). The Plaintiff-Appellant took the check and negotiated the same (R. 100). The right which the owner-insured, MARVIN E. HAYS, exercised under the policy was a non-forfeitable right (R. 23, policy attached thereto, non-forfeiture benefits). The exact language of the policy is as follows:

"NON-FORFEITURE BENEFITS

> Cash Surrender Value- The owner may surrender this policy at any time for its Cash Surrender Value, which will be the Cash Value obtained from the table of Non-forfeiture Values less any indebtedness. Values at interim points in a policy year will be calculated with due allowance for fractional premiums paid and time elapsed since the last anniversary, provided, however, that the Cash Value within 60 days of the due date of an unpaid premium shall be the same as on such due date".

The Beneficiary under the policy of insurance issued on the life of MARVIN E. HAYS, had no rights under the policy nor is she granted any by Utah Law with respect to the exercise of these non-forfeitable rights. The policy is specific, "with the exception of the benefit payable at the death of the insured to the Beneficiary, the owner, subject to the rights of any assignee, shall have all right, privileges and benefits contained in this policy" (R. 30, copy of policy attached). There seems to be no conflict in the law with regard to the rights of the insured under such policy. COUCH ON INSURANCE, 2d Ed., §32; 183. On the subject matter "Exercise of Option as Acceptance of an Offer", at page 412, while recognizing that there is some conflict in language of the cases on this subject matter and some analyses have been made which do not give appropriate effect to the language in its ordinary contract sense, the authority concludes;

"it is,however, generally and properly held that the insurer has no choice in the matter but is bound by the terms of its contract, and assuming the conditions to election have been satisfied, cannot refuse to give the election full effect. ***The better analysis of the problem is undoubtedly to hold that the option is the same as any other option contract, namely, that is the insurer who stands as offeror with no freedom of choice once the offeree-optionee, here the insured, chooses to exercise his option. In accordance with this view, it is held that the right or option under a life insurance policy to surrender the policy and accept its cash surrender value, constitutes a continuing offer on the part of the insurer which, when accepted by the insured through the exercise of such right or option, fixes the rights of the party without further action on the part of the insurer. Similarly, it is held that an option contained in a policy whereby the insured may surrender it for its cash value is an offer from the insurer to the insured which it is his right to accept in accordance with provisions of the policy as to time, and other details, and if he does so the contract is complete and the insurer has no right to accept or reject his election to take the cash surrender value; that is, its obligation is absolute, subject to such provisions as may exist as to the time of making the payment*** As a further application of these principles it has been held that if actual receipt of the election is not required, there is an effective election where the notice of the insured is mailed to the insurer, and that the mailing of a letter electing to take the surrender value precludes recovery for subsequent death, although the check for the amount of the surrender value was not received until later*** Statements to the effect that an election of a non-forfeiture clause contemplates a meeting of minds on the matter agreed upon should not be interpreted as indicating that the insured is making an offer which must be accepted by the insurer, for the agreement of the parties is to be found in the fact that the insurer had made the offer of the options one of which was then accepted by the election of the insured.

The fact that the insurer has not performed in accordance with the option after the election of the insured has been properly communicated to it, does not establish that the exercise of the option is not binding upon it, but only that it has failed to perform its contract according to its terms and that it may therefore be liable for damages for its breach.

§ 32:184. *****When the insurer has "accepted" the election of the insured the latter may no longer revoke his election, not because the election was an offer which the insurer could reject but because the act of "acceptance" definitively establishes that the acceptance by the insured of the option-offer was communicated to the insurer and thus became binding on both parties."

In the Kansas City Missouri case of PACK vs. PROGRESSIVE LIFE INSURANCE COMPANY, 187 SW 2d 501, decided in the Missouri Court of Appeals, March 5, 1945,

while the factual situation is not parallel to the instant case and involves many complicated factors which are irrelevant to consideration here, it remains that the insured in that case elected to take the cash value out of the policies which he had with the Defendant company, the company defended against a claim for the death benefits, and the Court concluded:

> "The privilege exercised, the option of surrendering the policies for their cash value was won, bought and paid for by the insured; such option is an offer contained in the policy contract and is from the company to the insured, and it is his right to accept the offer, within a specified time, and his acceptance completes the contract; the company has no right to accept or reject; its obligation to pay is absolute. In this case the only limitation is that, as the policy provided, the insurance company may defer such payment for a period not exceeding six months but that cannot effect fixed liability."

It should be noted that in this case O. E. Pack, the insured, died on June 17, 1936. Up to that date, the company had still not paid the amount of the cash value of the policies though it had recognized in writing its obligation to do so but insisted that it had the right under the policy to defer the payment for six months and then it failed to act. Mr. Pack having died, the Beneficiary brought suit seeking to recover the full amount due under the policies rather than the cash surrender value. The Court held that having exercised the right that the liabilities became fixed and the death of Mr. Pack did not change this or give the Beneficiary any increased rights, and the Court held:

> "we conclude that the admitted and undisputed evidence compels but one conclusion, and that is, that the insured definitely elected to take the cash surrender value of the policies at a time when he had a right to make such an election, and that such an election made a binding contract between the insured and the defendant. The fact that the defendant did not pay the cash value in accordance with the policies may be morally reprehensible, but in law it is a breach of contract. It is unnecessary to discuss the other questions raised."

In the instant case the company promptly paid the cash values of the policy which were accepted by Plaintiff (R. 112, 100). The Plaintiff admits that the insured did not at any time take any action to reverse the action which he had taken of submitting

the policy to the company for the cash surrender value (R. 89, Demand for Admissio No. 5 and response thereto). In the case of PACIFIC STATES LIFE INSURANCE COMPANY vs. BRYCE, decided by the Circuit Court of Appeals of the Tenth Circuit, 67 Fed. 2d 710, the facts were that the policy was issued upon the life of Charles W. Bryc who died March 28, 1932. The Plaintiff in that action was his widow and Beneficia of the insurance policy. The policy provided"

> "all the rights and benefits accruing hereunder to the insured are vested in said insured without consent of any Beneficiary unless otherwise provided by the insured or expressly prohibited by statute".

On January 18, 1932, the insured mailed the policy to the company with a statement that he would like to cash it in on February 3rd, the next premium date. On Janua 29th, the company called his attention to the fact that if the cash were withdrawn his insurance would be gone and suggested that he borrow on the policy instead. On February 3rd, the insured expressed his appreciation of the interest shown by the company, but adhered to his decision to cash in the policy. The company then mailed to him on February 9th, the form of agreement which recites,

> "the sole owners of policy No. 8549*** have this day surrendered said policy in consideration of its cash value which at this time amounts to $585.00, and said parties hereby acknowledge receipt of $585.00 in consideration of which the agreed or released said Pacific States Life Insurance for all further liabilities under policy No. 8549. This agreement was executed by the insured and also the Plaintiff (the beneficiary under the policy) although she was neither an assignee nor an irrevocably named beneficiary. On February 24th the company acknowledged receipt of the surrender agreement and advised by reason of conjestion in its loan department some delay would ensue in remitting the cash, but the check would go forward as soon as the application was reached in its turn. The insured took no further steps in the matter. After his death on March 28th, the company mailed a check for the surrender value on April 8th, which the parties stipulate was as soon as cash was available therefore and in its proper turn, and the policy was endorsed, cash surrender, April 8, 1932. Demand was made for payment of the face amount of the policy and refused and the suit therefore followed.***"

The Court held,

> ***"On the contrary, by his silence he acquiesced in the delay occasioned by the deluge of applications for surrender values. Nor are we presented with the question of whether a rescission could be had after the death of the insured had radically changed the situation as it existed when the contract was made. If there ever was a right to rescind the contract by which the insured became entitled to the surrender value, it was not one which could be exercised by the beneficiary of the surrendered policy. Upon the death of the insured there passed to his estate a claim of $435.00 against the insurance company. His personal representative, his heirs, his creditors cannot be deprived of this chose in action by one who was the beneficiary in a surrendered life insurance policy. If the administrator of his estate sued for the $435.00, the company could not defend upon the ground that the beneficiary elected that it should not pay it. Whatever may be the true rule as to the right of a beneficiary to exercise an option afforded by an insurance contract which the insured had not exercised in his lifetime, certainly one who once was a beneficiary in a surrendered insurance policy has no right to rescind a contract by which the insured converted an agreement to pay a larger sum upon death into an agreement to pay a smaller sum now.***"

The Supreme Court of Utah has previously considered a parallel case in the case of DECKER vs. NEW YORK LIFE INSURANCE COMPANY, decided February 21, 1938, 94 Utah 166; 76 P.2d 568. The case was twice before this Court. In the initial instance the Court considered the matter upon appeal from a judgment in favor of the Plaintiff. The judgment was in the amount of $3,220.00 in favor of Plaintiff who was awarded judgment for the proceeds of a policy upon the life of her deceased husband, Feramorz Decker. The facts were that Feramorz Decker, husband of the Plaintiff, had taken out a policy of life insurance with the Defendant for $5,000.00 executed on June 7, 1922. His wife was named Beneficiary. Decker failed to pay the quarterly premium due September 1, 1935 and on October 26, 1935, he delivered the policy to and requested the Defendant insurance company to pay to him the cash surrender value. The cash surrender value as of September 1, 1935, was $660.00, but there was an indebtedness of $407.48 against the policy. Decker died on November 3, 1935, eight days after delivery of the policy and before the Defendant had paid to Decker the net surrender value of $252.52. The facts as thus set forth were admitted by the pleadings. The

Plaintiff, the Beneficiary under the policy, sued for the $3,000.00 face value of the policy remitting any allowance over the amount of $3,000.00 in order to keep the matter in State Court. The Plaintiff claimed that the insurance was in full force as of the date of the death of the insured subject only to the amount of the loans. There was no dispute that the policy provisions provided that after three full years of premiums having been paid, the insured at the end of any insurance year or within three months after any default in payment of a premium but not later, might surrender the policy and receive its cash surrender value. The Plaintiff advanced many theories in support of her contention, each of which was careful considered and disposed of by the Court. Some of the points considered have no relevance because of the different factual situation but on the point which is prec parallel to this case the reasoning of the Court as outlined in the DECKER decisio is quoted as follows:

> "It will be noted from the policy that the option to surrender and receive the cash surrender value is one which can be exercised irrespective of the assent of the insurance company. It is not governed by the rule of sale which holds that where goods are sold for cash title will not be considered as having passed until the cash is paid. While the policy states that the 'Insured may * * * surrender the policy, and (1) Receive its cash surrender value,' it does not say that he should receive it contemporaneously. It is difficult to see how the company could write several alternatives for the surrender of the policy without putting in the words, 'Receive its cash surrender value.' Respondent contends that if delivery of the policy and the reception of cash were not to be simultaneous but the company was to have time after delivery of the policy to pay the surrender value, it should have so stipulated. Perhaps the insured might have insisted on a contemporaneous transaction, but the fact is that he did not do so. He sent the policy in with a request for the net due to him from his reserve. This was an unequivocal election to terminate the policy and accept its cash surrender value less his indebtedness. Only eight days passed between this act and his death, not an unreasonable time in which to put the policy through the processes of audit and to return the cash. But if it were contemplated that the insured might demand payment of the surrender value contemporaneous with the delivery of the policy, he did not require it. He made his election. It is unfortunate that he did so in view of his unexpected demise so soon

thereafter. But that fact cannot affect the election. He gave up his policy, made his election to take the cash surrender value, and the company could do nothing else than to send it to him or his personal representative. It had no choice. He or his representative could enforce the duty by suit. Whether the election might be recalled for failure to pay or tender within a reasonable time is not involved in this suit.

In the case of Pacific States Life Ins. Co. v. Bryce, 67 F.2d 710, 711, 91 A.L.R. 1446, written by Judge McDermott of the Tenth Circuit Court of Appeals, the facts were substantially as in the case at bar. They appear from the quoted portion of that decision. The court said:

'The pleadings tender the simple issue as to whether the policy was effectively surrendered prior to the death of the insured. The facts are stipulated. A net reserve of $435.00 had accumulated on this policy by February 3, 1932, the premium paying date. The policy accorded the insured three elections as to this reserve: It could (1) be withdrawn in cash, or (2) used to purchse a paid-up policy for a reduced amount, or (3) used to purchase extended insurance for the face of the policy for a limited term. In the absence of such election, feature (3) became automatic. * * *

'On January 18 (1933) the insured mailed the policy to the company with the statement that he would like to cash it in on February 3 (1933), the next premium date. * * * The company then mailed him, on February 9, a form of agreement which recites that the 'sole owners of Policy No. 8549 * * * have this day surrendered said Policy in consideration of its cash value, which at this time amounts to Five Hundred Eighty-five and no/100 Dollars.' * * *

'This agreement was executed by the insured and also the plaintiff, although she was neither an assignee nor an irrevocably named beneficiary. On February 24, the company acknowledged receipt of the surrender agreement and advised that by reason of the congestion in its Loan Department, some delay would ensue in remitting the cash, but that check would go forward as soon as the application was reached in its turn.

'The insured took no further steps in the matter. After his death on March 28, the company mailed a check for the surrender value on April 8. * * * Demand was made for the payment of the face of the policy, refused, and this suit followed. * * *

'Plaintiff's theory, adopted by the trial court, is that the execution of the surrender agreement was an offer by the insured to the company to surrender the policy for a cash payment of $435.00; that such offer lapsed and the surrender agreement voided because

the surrender value was not paid within a reasonable time or before the death of the insured.

'With this construction of the policy contract we are not in accord. It puts the cart before the horse. The policy vested in the insured certain definite rights, among them the right to be paid the reserve on his policy in cash upon a surrender of his policy, if demanded within a specified time. The insured did demand the surrender value within the prescribed time, and surrendered his policy. When he did so-a month before his death-he became absolutely entitled to payment in cash of $435.00. Upon his death his estate, and not his beneficiary became entitled to that sum. The offer is contained in the policy contract, and is from the company to the insured; the option is in the insured and not the company, and his acceptance completes the contract; the company has no right to accept or reject; its obligation to pay is absolute. Under plaintiff's theory, an insured may only offer to surrender his policy for its cash value; the company may then accept or reject the offer, and if it fails to pay as agreed, the offer lapses. Such a construction would wipe out the right of an insured to the cash surrender value of his policy, because the company could defeat his right by rejecting his offer, or by failing to pay. To construe an exercise of an option as an offer to the company, subject to rejection or lapse, would be to warp the plain terms of the contract and to deny the insured a right he has paid for. If Bryce, on March 15, had sued the company for $435.00, could the company have defended on the ground that it had not accepted his offer to take the cash surrender value? Clearly not; yet plaintiff's contention comes down to that.'

Respondent both criticizes this case and attempts to distinguish it from the one at bar. The criticism is hurled at the ground for the decision mentioned in the Bryce Case, i.e., that there was a continuous irrevocable offer on the part of the insurer to pay the cash surrender value upon delivery of the policy, and that insured's acceptance completed the contract. We have no disposition to battle for this conception. It seems sufficient to us to hold that by the contract the insured had a right to elect to surrender the policy and receive the net surrender value and that the transactions of delivery or surrender and reception of the money were not required to be contemporaneous, at least if he did not insist upon it. We think the Bryce Case correctly decided on the principle that the surrender by the insured was complete when he delivered the policy to the insurance company with request for payment of its cash surrender value."

Since the case on its original hearing before the Court had come there on demurer, and since the pleadings had raised issues of fact not fully decided, the Court retu the case for further action. It was again presented on further appeal after the

trial on the merits in August of 1939, 97 Utah 453, 93 P.2d 689. The factual situation with regard to the surrender of the policy was discussed at length but the provisions and the discussion are not particularly helpful to the decision in this case because the policy was delivered to the office of the insurance company by putting the same through a mail slot in the door, no one was present, the policy was found by someone who entered the building, the question was whether there was fraud involved in connection with the transaction. After having considered the various factual elements the Court reiterated its opinion at Page 693 of the Pacific Report,

> "the exercise of either of the options become effective from the time exercised. No meeting of minds is required to entitle the insured to the option selected by him. The election to take the cash surrendered value was one over which the insurer had no control. The request for the cash surrender value was made and was not recalled.***
>
> There was no substantial evidence when considered with the pleadings upon which the jury could have found for the plaintiff. Under the allegations and proof, all reasonable men would conclude that the insured had signed and sent on its way the cash surrender request and that during the lifetime of the insured it had not been recalled. Under such circumstances, a directed verdict for the defendant was proper.***"

In a very recent annotation on this subject appearing in 15 ALR 3rd at page 1317, the annotating authority discusses,

> "Insured's Exercise of Election Afforded Under Life Insurance Policy as Affected By His Death Before Complete Consumation of Option."

The annotating authority says, Page 1319, Sec. 1. Introduction,

> "This annotation collects the cases which are concerned with the question whether an insured's death prevents his partially consummated election afforded under a life insurance policy from being legally effective. ***

II. GENERAL RULES

Sec. 3. Continuing-offer rule (page 1321)

Ample authority supports the fundamental rule that an option contained in a life insurance policy is a continuing

> and irrevocable offer which becomes a binding contract when accepted by the insured, the subsequent death of the insured being irrelevant to the effectiveness of the election." (Citing many cases including Pacific States Life Ins. Co. v. Bryce - supra and Decker v. New York Life Ins. Co. supra.) (Emphasis ours)

The authorities cited by the Plaintiff-Appellant to the effect that the Beneficiary has a vested interest in the policy and that the policy could not be surrendered without the consent of the Beneficiary are not pertinent inasmuch as th contract provisions made it clear in the instant case that the insured enjoyed all rights under the policy.

There is no statutory provision in this state which requires the consent of the Beneficiary to the taking of any action which the insured reserves to himsel under the policy. The legislature of the State of Utah has not been silent upon th matter of non-forfeitable rights under an insurance policy and has enacted 31-22-13 Utah Code Annotated 1953 as Amended by Laws of Utah 1963, Chapter 45, Section 2, an Laws of Utah 1973, Chapter 49, Section 7, wherein the provisions of a policy with regard to non-forfeitable rights are statutorily commanded. But in so doing, the Legislature has not made any provision which requires that a Beneficiary be consult in the exercise by the insured of these non-forfeitable rights. It should be noted that MRS. HAYS was aware her husband had surrendered the policy on the day that he did so (R. 100). Nothing was done by her or her husband in regard to the matter until after his unexpected death three days later (R. 100). The law is clear that MARVIN E. HAYS, having exercised his non-forfeitable right under the policy of insur ance to the cash surrender value of the policy which action he did not rescind duri his lifetime had effectually determined the amount to be paid under the policy. Th amount was paid and the Plaintiff has had the benefit thereof by her own admission (R. 100).

The relationship between NORTH AMERICAN LIFE AND CASUALTY COMPANY, if any with FIDELITY INDUSTRIAL CREDIT COMPANY OF OGDEN, is immaterial to the decision of

this case. No right of the insured or of the Plaintiff is dependent upon any action which was taken by FIDELITY INDUSTRIAL CREDIT COMPANY OF OGDEN. Neither FIDELITY INDUSTRIAL CREDIT COMPANY OF OGDEN nor anyone else could act to annul the action of the insured in exercising his prerogative to accept the cash benefits under the policy. Consequently the question of whether FIDELITY INDUSTRIAL CREDIT COMPANY OF OGDEN did or did not call the insurance company to advise them of the death of MR. HAYS has no bearing on the Court's decision. The insured had acted, he did not retract the action during his lifetime. Any default by FIDELITY INDUSTRIAL CREDIT COMPANY OF OGDEN in carrying out MRS. HAYS' instruction to notify the insurance carrier of the death of MR. HAYS can have no affect upon the outcome of the case if, in fact, such a default took place. The question of whether or not the policy was written through FIDELITY INDUSTRIAL CREDIT COMPANY OF OGDEN or whether it was the proper agency to pay premiums to and other miscellaneous issues implied or suggested by the Plaintiff's Complaint and Interrogatories are equally immaterial, for under the factual situation here admitted, nothing hinges upon the performance of FIDELITY INDUSTRIAL CREDIT COMPANY OF OGDEN or its relationship to NORTH AMERICAN LIFE AND CASUALTY COMPANY.

CONCLUSION

The Judgment should be affirmed.

Respectfully submitted this 20th day of January, 1976.

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CERTIFICATE OF MAILING

Two copies of the foregoing Brief of Respondent North American Life and Casualty Company were posted in the U. S. Mail, postage prepaid and addressed to the Attorneys for Appellant, PETE N. VLAHOS of VLAHOS & KNOWLTON, Legal Forum Building, 2447 Kiesel Avenue, Ogden, Utah 84401 and to CARL T. SMITH and DONALD J. LITTLE, Attorneys for Fidelity Industrial Credit Company of Ogden, 520 - 26th Street, Ogden, Utah 84401, on this 21st day of January, 1976.

Allen H. Tibbals